

DEPARTMENT OF STATE REVENUE**LETTER OF FINDINGS NUMBER: 06-0126****Utility Receipts Tax
For Tax Years 2003-04**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE**I. Utility Receipts Tax—Imposition**

Authority: IC 6-2.3-1-4; IC 6-2.3-2-1; IC 6-2.3-3-3

Taxpayer protests the imposition of utility receipts tax.

II. Tax Administration—Negligence Penalty

Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a Rural Electric Membership Corporation ("REMC") in Indiana. As the result of an audit, the Indiana Department of Revenue ("Department") issued proposed assessments for Utility Receipts Tax ("URT") for the tax years 2003 and 2004. Taxpayer protests the proposed assessments. Further facts will be supplied as required.

I. Utility Receipts Tax—Imposition**DISCUSSION**

Taxpayer is an REMC in Indiana. The Department determined that taxpayer had URT liabilities for the years 2003 and 2004. Taxpayer protests most of the proposed liabilities. First, taxpayer states that the Department incorrectly imposed URT on receipts in the form of payments from the Federal Emergency Management Agency ("FEMA").

The Department included these receipts based on IC 6-2.3-3-3, which states:

Gross receipts include the amount of any legal settlement or judgment received to compensate the taxpayer for lost retail sales of utility services.

Taxpayer has provided sufficient documentation to establish that the FEMA payments were for the repair of taxpayer's property damaged in storms. The receipts were not compensation for lost retail sales of utility services, as required by IC 6-2.3-3-3.

Second, taxpayer protests the imposition of URT on rebates from a wholesale power supplier. Taxpayer had programs under which it offered discounts to its members who installed an electric water heater and/or HVAC (heat pump). The wholesale power supplier would then reimburse taxpayer a portion of the costs associated with the program. The Department considered these reimbursements as subject to URT. IC 6-2.3-1-4 states:

"Gross receipts" refers to anything of value, including cash or other tangible or intangible property, that a taxpayer receives in consideration for the retail sale of utility services for consumption before deducting any costs incurred in providing the utility services.

Also, IC 6-2.3-2-1 states:

An income tax, known as the utility receipts tax, is imposed upon the receipt of:

- (1) the entire taxable gross receipts of a taxpayer that is a resident or a domiciliary of Indiana; and
- (2) the taxable gross receipts derived from activities or businesses or any other sources within Indiana by a taxpayer that is not a resident or a domiciliary of Indiana.

Since taxpayer is a resident or domiciliary of Indiana, under IC 6-2.3-2-1(a), URT is imposed upon the receipt of its entire taxable gross receipts. However, IC 6-2.3-1-4 explains that "gross receipts" are anything of value received in consideration for the retail sale of utility services for consumption. Reimbursement for the installation of water heaters and HVACs is not the retail sale of utility services for consumption. Therefore, since the reimbursements do not qualify as "gross receipts" under IC 6-2.3-1-4, URT is not imposed on them under IC 6-2.3-2-1(a).

Taxpayer also protests the imposition of URT on funds it received from its customers for payment of leases on power factor equipment the customers leased from third party vendors. Taxpayer paid the lease amount to the third party and then collected the same amount from its customer. These pass-through payments are not the retail sale of utility services for consumption. As previously explained, IC 6-2.3-1-4 defines "gross receipts" as anything of value received in consideration for the retail sale of utility services for consumption. The pass-through payments in question do not qualify as gross receipts under IC 6-2.3-1-4, and so are not subject to URT under IC 6-2.3-2-1(a).

Taxpayer also protests the imposition of URT on reimbursements from various sources. These include such reimbursements as amounts billed to: an employee for damage to a truck, directors for dependent dental insurance, another power company for its portion of a group sponsorship,

another power company for its portion of group advertising, a director for reimbursement of a shared savings plan, another power company for baseball tickets, a director for expense reimbursement, a director for baseball tickets, a director for reimbursement for a t-shirt, to another company for its portion of catering to a group event. As previously explained, IC 6-2.3-1-4 defines “gross receipts” as anything of value received in consideration for the retail sale of utility services for consumption. The pass-through payments in question do not qualify as gross receipts under IC 6-2.3-1-4, and so are not subject to URT under IC 6-2.3-2-1(a).

In conclusion, IC 6-2.3-1-4 explains that “gross receipts” are anything of value received in consideration for the retail sale of utility services for consumption and under IC 6-2.3-2-1(a) URT is imposed upon the receipt of its entire taxable gross receipts. Therefore, the URT does not apply to the amounts taxpayer received from FEMA for repair to property. The URT does not apply to amounts taxpayer received as reimbursements on water heater and HVAC installations. The URT does not apply to the pass-through payments taxpayer received on the lease payments for power factor equipment taxpayer’s customers leased from third parties. The URT does not apply to the reimbursements taxpayer received for various non- retail sale of utility services.

FINDING

Taxpayer’s protest is sustained.

II. Tax Administration—Negligence Penalty

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax year in question. Taxpayer protests the imposition of penalty. The Department refers to IC 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to 45 IAC 15-11-2(b), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer’s carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence.

Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) provides in pertinent part:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, taxpayer incurred a deficiency which the Department determined was due to negligence under 45 IAC 15-11-2(b), and so was subject to a penalty under IC 6-8.1-10-2.1(a). Taxpayer has affirmatively established that there was no deficiency and so met the burden imposed by 45 IAC 15-11-2(c).

FINDING

Taxpayer's protest is sustained.

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